(1) 95-1396

No. _____

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LEE CHARLES BROADWATER,

Petitioner,

VS.

ERNEST PREATE, JR., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LEE CHARLES BROADWATER

STATE CORRECTIONAL INSTITUTION

P.O. BOX 244, AK-1059

GRATERFORD, PA 19426

Pro Se

29 pp

QUESTION PRESENTED

IS RELIEF BY THE SUPREME COURT NECESSARY WHEN THE COURT OF APPEALS SUMMARILY AFFIRMS THE DISTRICT COURT'S SANCTION OF A STATE'S ACTION TO DETAIN A STATE PRISONER BEYOND THE MAXIMUM SENTENCE EXPIRATION DATE OF A STATE SENTENCE WHERE THE PRISONER HAS EXHAUSTED STATE REMEDIES AND SHOWS THAT THE STATE'S ACTION VIOLATES THE RIGHTS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES?

PETITIONER ANSWERS AFFIRMATIVELY.

LIST OF PARTIES

Petitioner

Lee Charles Broadwater

State Correctional Institution at Graterford

P.O. Box 244, AK-1059

Graterford, PA 19426

Respondents

Ernest Preate, Jr.

Attorney General of Pennsylvania

16th Floor, Strawberry Square

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Donald T. Vaughn, Superintendent

State Correctional Institution at Graterford

P.O. Box 246

Graterford, PA 19426

Claude A. Lord Shields

District Attorney of Schuylkill County

401 N. 2nd Street

Pottsville, PA 17901

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The summary affirmation order of the United States Court of Appeals for the Third Circuit which appears at Appendix A and is unpublished.

The order of the District Court, which adopts the Report and Recommendation of the United States Magistrate judge, that appears at Appendix B and the magistrate's Report and Recommendation that appears at Appendix C which are also unpublished.

JURISDICTION

The court of appeals issued its order affirming the district court's dismissal on December 13, 1995. No petition for rehearing was filed.

The jurisdiction of the Supreme Court of the United States is now invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment of the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 2241:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless-

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

61 Pa.C.S.A. § 331.21a

(a) Convicted Violators. Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution of the Commonwealth who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment, for which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendre at any time thereafter in a court of record, may, at the discretion of the board, be recommitted as a parole violator. If his recommitment is so ordered, he shall be reentered to serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time spent at liberty on parole. The board may, in its discretion, reparole whenever, in its opinion, the best interests of the prisoner justify or require his release on parole and it does not appear that the interests of the Commonwealth will be injured thereby. The period of time for which the parole violator is required to serve shall be computed from and begin on the date that he is taken into custody to be returned to the institution as a parole violator.

(b) Technical Violators. Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution

in the Commonwealth who, during the period of parole, violates the terms and conditions of his parole, other than by commission of a new crime of which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendre in a court of record, may be recommitted after hearing before the board. If he is so recommitted, he shall be given credit for the time served on parole in good standing but with no credit for delinquent time, and may be reentered to serve the remainder of his original sentences.

STATEMENT OF THE CASE

On March 7, 1972, the petitioner was arrested and charged with murder generally at no. 248 of 1972, Schuylkill County, Pennsylvania. Petitioner eventually pled guilty and was sentenced in February of 1973 to the maximum term of ten to twenty years imprisonment, effective date being March 7, 1972, with the maximum sentence expiration date of March 7, 1992.

After serving ten years Mr. Broadwater was paroled on March 8, 1982. While on parole in December 1987, the petitioner was arrested and charged with driving under the influence of alcohol (DUI). This was a first offense and did not involve a motor vehicle accident. A hearing was immediately held at the field office of the parole board and Mr.

Broadwater was continued on parole pending disposition of the DUI charge.

In November of 1988, petitioner was convicted of the DUI charge. The state parole board held an administrative hearing on January 6, 1989, regarding this new conviction and issued its decision on January 23, 1989, stating the Mr. Broadwater be recommitted for zero months on the new DUI offense. However, the board simultaneously denied credit for petitioner's accumulated parole time in good standing and recomputed the maximum sentence expiration date of the twenty year sentence to be February 8, 1997.

After several unsuccessful attempts to have his good standing parole credit reinstated by the board before the maximum sentence expired on March 7, 1992, Mr. Broadwater filed a petition for habeas corpus relief with the court in Schuylkill County (the original state sentencing court) in late March 1992, alleging that the department of corrections was illegally detaining him under the court's expired twenty year sentence by order of the state parole board.

On June 25, 1992, a hearing was held in the Court of Common Pleas of Schuylkill County, Pennsylvania, at which time the Commonwealth's witness, a parole board records specialist, testified that the board had ordered a zero recommitment for the DUI offense. On July

8, 1992, however, the common pleas court issued an order denying relief and a timely appeal was filed with the state superior court. That court affirmed the order of the sentencing court and Mr. Broadwater then petitioned the State Supreme Court for relief. That court declined to exercise its discretionary authority to review the petition.

In May of 1993, a petition for relief and damages was filed in the United States District Court for the Middle District of Pennsylvania. On August 5, 1993, that court denied relief. A timely request for a certificate of probable cause was filed with the United States Court of Appeals for the Third Circuit, however, on January 28, 1994, the court dismissed the appeal.

Mr. Broadwater then filed a habeas petition in the original jurisdiction of the Commonwealth Court of Pennsylvania, having been moved to the state prison at Graterford, and on September 29, 1995, that court adopted the Report and Recommendation of the magistrate dismissing the petition. A timely appeal was filed with the Third Circuit but on December 13, 1995, that court summarily affirmed the action of the district court.

This petition for writ of certiorari to the Supreme Court of the United States is now taken for the reasons that follow.

REASONS FOR GRANTING THE WRIT

Aside from the obvious claim petitioner makes for the five years imprisonment in violation of the rights guaranteed to him by the Constitution and laws of the United States, the issue presented is fundamental in terms of liberty and controversy between the individual and the state, particularly where the state's highest court remains silent.

More than fifty years ago the Pennsylvania Supreme Court put to rest any doubt about the nature of administrative authority granted to the newly formed parole agency and defined its executive role in the supervision of released convicts. Commonwealth ex rel. Banks v. Cain, 345 Pa. 581 (1942). That court set forth the principles of constitutional law that prohibit the administrative agency from assuming any discretion or control over the length of a term of punishment imposed by the court. Since then statutory law has defined the powers and duties of the parole board when a recommitment of the parolee is considered by the board. 61 Pa.C.S.A. § 331.21a.

It is clear that the controlling statue is conditional as to the consequence a convicted parolee will encounter based upon the administrative determination made by the board after its hearing on the circumstances of the new offense. The denial of a parolee's accumulated parole time in good standing is not mandatory under the Pennsylvania

statute as was erroneously stated first by the district court for the Middle District of Pennsylvania and subsequently relied on by the magistrate in the Eastern District. See Appendix C.

Mr. Broadwater's point can be no better explained than the one put forth in dictum by the Commonwealth Court of Pennsylvania in a recent decision involving this statute:

". . . where the board decides not to recommit a parolee who was convicted of a new offense (while on parole), the parolee does not lose credit for the street time accumulated while on parole. The statute clearly mandates the loss of street time only where the board chooses to recommit the parolee as a convicted parole violator." Andrews v. Commonwealth, Pa. Board of Probation and Parole, 101 Pa.Cmwlth. 468, 516 A.2d 838 @ 841 (1986), appeal denied, 546 A.2d 622, 519 Pa. 661.

Yet both district courts that have reviewed petitioner's case have dismissed his plea by concluding to the contrary that Pennsylvania law requires the board to deny him credit for the time spent in good standing.

A ZERO (0) RECOMMITMENT decision by the state parole board undeniably evidences its choice that a period of recommitment for the DUI offense is not appropriate for Mr. Broadwater. Indeed, zero means that no recommitment will take place, the parolee will not be reentered to serve a period of incarceration for the offense, and no

imprisonment was ordered after the board considered the facts and circumstances of the new conviction. And once the parole board made the administrative determination that a period of recommitment was not warranted for the new offense it was legally precluded from denying credit to the twenty year sentence, and consistent with state law, it should have discharged the petitioner from the twenty year sentence on March 7, 1992.

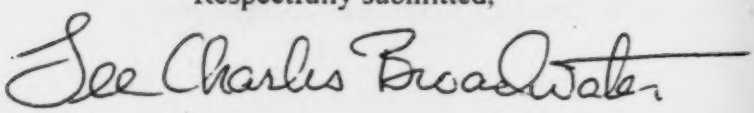
The state respondents do not deny that credit for parole time is given to convicted parolees in Pennsylvania where the board determines that a period of recommitment is not appropriate for a new offense. But, in the instant matter, they attempt to justify the agency's action by claiming a recommitment was ordered, as though the ministrative duty to add or subtract the accumulated parole time arises from the agency's own discretion rather than a statutory duty based upon the administrative determination, by attempting to distinguish recommit for zero months from zero recommitment.

CONCLUSION

The petitioner likens his predicament as a snowball rolling downhill that began with a small misconception that the law mandated the loss of credit towards completion of the twenty year sentence and asks that an appropriate snowfence be erected.

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,



Lee Charles Broadwater

State Correctional Institution

P.O. Box 244, AK-1059

Graterford, PA 19426

Pro Se

DATE: February 12, 1996

APPENDIX A November 30, 1995

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 95-1929

LEE CHARLES BROADWATER

vs.

ERNEST PREATE, ET AL.

(E.D. PA. CIV. NO. 95-CV-03851)

Present: STAPLETON, NYGAARD AND LEWIS, CIRCUIT JUDGES

Submitted are:

(1) Appellant's notice of appeal which may be construed as a request for a certificate of probable cause pursuant to Rule 22 (b) Federal Rules of Appellate Procedure and LAR 22.1;

(2) By the Clerk is the within appeal for possible summary action pursuant to Local Appellate Rule 27.4 and Chapter 10.6 of the Court's Internal Operating Procedures;

(3) Appellant's memorandum of law in support of issuance of a certificate of probable cause;

(4) Commonwealth's memorandum of law opposing issuance of a certificate of probable cause; and

(5) Schuylkill County District Attorney's memorandum of law opposing issuance of a certificate of probable cause;

in the above-captioned case.

Respectfully,

P. Douglas Sisk/JDM

Clerk

PDS/JDM/zm ORDER

The foregoing is summarily affirmed.

By the Court,

Circuit Judge

Certified a true copy and issued in lieu

of a formal mandate on January 4, 1996

Teste: P. Douglas Sisk

Clerk, United States Court

of Appeals for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

September 28, 1995

LEE CHARLES BROADWATER — CIVIL ACTION

V.

ERNEST PREATE, Attorney General

of Pennsylvania, et al. — No. 95-3851

ORDER

EDUARDO C. ROBRENO, J.,

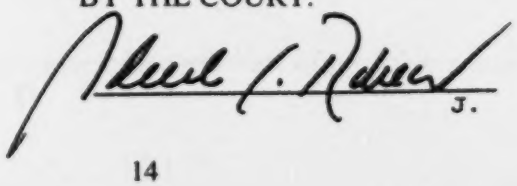
AND NOW, this 28th day of September, 1995, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi and plaintiff's objection to Magistrate (Judge's) Report and Recommendation IT IS ORDER that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for a writ of habeas corpus is DISMISSED.

3. There is no probable cause for appeal

BY THE COURT:



J.

APPENDIX C

August 30, 1995

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEE CHARLES BROADWATER CIVIL ACTION

V.

ERNEST PREATE, Attorney General

of Pennsylvania, et al. No. 95-3851

REPORT AND RECOMMENDATION

PETER B. SCUDERI

UNITED STATES MAGISTRATE JUDGE August 29, 1995

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 by an individual currently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. For the reasons that follow, I recommend that the petition be dismissed.

FACTS AND PROCEDURAL HISTORY:

In January 1973, Broadwater pleaded guilty to charges of murder in the second degree. (Schuylkill County No. 248 of 1972). He was sentenced to ten to twenty years' incarceration. After serving 10 years, including time he served prior to his sentencing, Broadwater was paroled on March 8, 1982. His parole would not expire until March 7, 1992.

In November 1988, Broadwater was convicted of driving under the influence of alcohol ("DUI"). After a hearing, the Pennsylvania Board of Probation and Parole recommitted Broadwater as a convicted parole violator. He was not given credit for the time he spent on parole and was directed to serve six months as a technical parole violator. However, he received no time for the DUI. His release date was recalculated to February 8, 1997.

After filing a habeas corpus petition in the Common Pleas Court, and appealing the denial of relief, Broadwater filed a habeas corpus petition in the United States District Court of the Middle District of Pennsylvania.[1] In the petition, Broadwater asserted that he was entitled to immediate release from custody and monetary damages because the Parole Board erred in failing to give him credit for the six years he was on parole.

On August 5, 1993, the Honorable James F. McClure, Jr., United States District Court for the Middle District of Pennsylvania, denied Broadwater's request for relief and damages. Judge McClure found that the Parole Board did not err in recalculating his release date to

[1] At the time Broadwater filed the petition for habeas corpus, he was incarcerated at the State Correctional Institution at Rockview, Pennsylvania. SCI Rockview is located in the Middle District of Pennsylvania. Since an application for habeas corpus may be filed in the district wherein a person is in custody or in the district where the person was convicted, Broadwater properly filed the petition in the Middle District. See 28 U.S.C. § 2241 (d).

February 8, 1997 because revocation of Broadwater's street time was mandated by statute. See 61 Pa.C.S.A. § 331.21a (a).

Broadwater sought a certificate of probable cause from the Third Circuit Court of Appeals. On January 28, 1994, the Third Circuit dismissed the appeal as frivolous.

After Broadwater was denied habeas relief in the federal district court, he filed a habeas petition in the Commonwealth court. On October 20, 1994, the Honorable Joseph Doyle, Commonwealth Court of Pennsylvania, dismissed the petition. Broadwater then filed a petition for allowance of appeal which was denied by the Pennsylvania Supreme Court on April 17, 1995.

On June 20, 1995, Broadwater filed this petition for habeas corpus requesting release from prison and $2,500,000 in damages. Again Broadwater claims that the Parole Board erred in not crediting his sentence with the time spent on parole.[2]

Since Broadwater is asserting an identical habeas corpus claim to that previously presented to the district court in the Middle District of Pennsylvania, the petition should be dismissed pursuant to 28 U.S.C. § 2244 (a).

---

[2] In his petition, Broadwater states that he presents the same facts in this petition that he presented in the petition in the Middle District. (Petition for Habeas Corpus, at 4).

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus...if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge of court satisfied that the ends of justice will not be served by such inquiry.

28 U.S.C. § 2244 (a).[3] Judge McClure found that the Parole Board properly recalculated Broadwater's sentence consistent with state law. Nothing that Broadwater now restates causes the court to question Judge McClure's decision. Therefore, Broadwater has failed to show that the ends of justice require consideration of the same claim.

To the extent that Broadwater seeks monetary relief, his petition would properly be filed as a civil rights claim pursuant to 42 U.S.C. § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 494 (1972) (a damages action by a state prisoner could be brough under the Civil Rights Act rather than through a petition for habeas corpus). However, since the

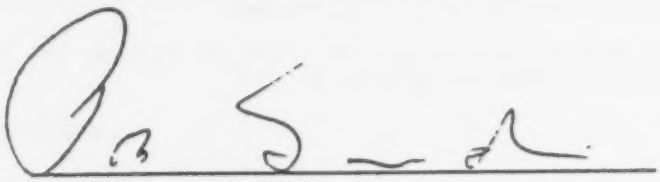
[3] Rule 9 (b) of the Rules of Governing Section 2254 Cases also states that successive petitions may be dismissed if they fail to allege different grounds for relief. However, Broadwater's petition, to the extent he seeks release from prison, is properly filed pursuant to § 2241 because he not attacking the imposition of the court's sentence, but rather the execution of that sentence by the Parole Board.

underlying action of the Parole Board has not been found to be unlawful, that claim would also fail.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 29th day of August, 1995, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DISMISSED. There is no probable cause for appeal.



PETER B. SCUDERI

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

COMMONWEALTH OF PENNSYLVANIA

PENNA. BOARD OF PROBATION AND PAROLE

DATE: 012389

CLIENT NAME: LEE C. BROADWATER

PAROLE NUMBER: 1813J

INSTITUTION: STATE CORRECTIONAL INSTITUTION PITTSBURGH

INSTITUTION NUMBER: K1059

AS RECORDED ON 010689 THE BOARD OF PROBATION AND PAROLE RENDERED THE FOLLOWING DECISION IN YOUR CASE:

Refer to recommitment action of 11-14-88 as a Technical Parole Violator to serve 6 months and now, recommit to a state correctional institution as a convicted parole violator to serve 0 months for a total of 6 months on backtime.

- 0 months for the offense of driving under the influence. Evidence relied on: Conviction in a court of record. Certified copy of court record. Reasons: Conviction in a court of record established.

Mitigating: Family support. Employment available. In-patient program available.

Reparole 2-9-89 to an in-patient alcohol program of at least 28 days only, upon condition that there are no misconducts.

Removal of termination from the program for any reason other than successful completion is a violation of your parole.

When released to the street, out-patient, alcohol and stress anger treatment is a special condition of your parole supervision until the treatment source and/or parole supervision staff determine it is no longer necessary. You will be required to sign the appropriate release of confidential information form.

You must not consume alcohol under any condition or for any reason.

You must not enter establishments that sell or dispense alcohol.

You must support your dependents.

You must maintain employment.

Also subject to any conditions that may be imposed.

If you wish to appeal this decision, you must file a request for administrative relief with the board within thirty days of this order. This request shall be set forth specifically the factual and legal basis for the

allegations. See 37 PA code sec. 73. You have the right to an attorney in this appeal and in any subsequent appeal to the commonwealth court.

(F.B. 1-6-89)

(Dictated - 1-19-89 - SA/NG)

DATE MAILED: Jan. 26, 1989

Parole violation max date: 010897

/Hermann Tartler

HERMANN TARTLER

BOARD SECRETARY

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LEE CHARLES BROADWATER,

Petitioner,

VS.

ERNEST PREATE, JR., et al.

Respondents.

PROOF OF SERVICE

I, Lee Charles Broadwater, do hereby declare that on this date, February 26, 1996, in accordance with Supreme Court Rule 29, I am serving the foregoing Petition For Writ Of Certiorari upon the following persons by first class mail, postage prepaid:

Attorney General of Pennsylvania

C/O Ms. Sue Ann Unger

Senior Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

21 S. 12th Street, 3rd Floor

Philadelphia, PA 19106

Claude Lord Shields

District Attorney of Schuylkill County

401 N. 2nd Street

Pottsville, PA 17901

Donald T. Vaughn, Superintendent

State Correctional Institution

P.O. Box 246

Graterford, PA 19426

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS 26TH DAY OF FEBRUARY, 1996.

BY:

Lee Charles Broadwater

Lee Charles Broadwater